

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33922

STATE OF IDAHO,)	2008 Unpublished Opinion No. 477
)	
Plaintiff-Respondent,)	Filed: May 20, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
ABID ELI GARCIA-MOLINA,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Judgment of conviction for possession of a controlled substance with intent to deliver, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant. Sarah E. Tompkins argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

PERRY, Judge

Abid Eli Garcia-Molina appeals from his judgment of conviction for possession of a controlled substance with intent to deliver. Specifically, Garcia-Molina contends that the district court executed a vindictive sentence for ordering restitution that punished him for exercising his right to go to a jury trial. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

A jury found Garcia-Molina guilty of possession of a controlled substance, methamphetamine, with intent to deliver. I.C. § 37-2732(a)(1)(A). The district court sentenced Garcia-Molina to a unified term of seven years, with a three-year period of minimum confinement. However, the district court suspended Garcia-Molina's sentence and placed him on probation for seven years. Based on a recommendation of the state, the district court also

ordered that Garcia-Molina pay \$5,109.73 in restitution pursuant to I.C. § 37-2732(k). Garcia-Molina appeals.

II. ANALYSIS

Garcia-Molina asserts that the district court violated his right to due process when it imposed a more severe sentence because he exercised his constitutional right to a jury trial. Specifically, Garcia-Molina contends that the district court punished him by imposing additional restitution costs to reimburse law enforcement agencies because he proceeded to trial.¹ The state counters by arguing that the district court did not act vindictively but, rather, followed Idaho law in awarding the costs of investigation of Garcia-Molina's crime.

Where a defendant claims that his or her right to due process was violated, we defer to the trial court's findings of fact, if supported by substantial evidence. *State v. Smith*, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001). However, we freely review the application of constitutional principles to those facts found. *Id.*

To show a violation of due process, a defendant must demonstrate the judge's vindictiveness or intent to punish the defendant for exercising his or her rights. *State v. Stedtfeld*, 114 Idaho 273, 276, 755 P.2d 1311, 1314 (Ct. App. 1988). Vindictiveness focuses on the sentencing judge's view of the defendant's decision to plead not guilty and go to trial. *State v. Regester*, 106 Idaho 296, 300, 678 P.2d 88, 92 (Ct. App. 1984). That view cannot be determined by a single remark removed from context. *Id.* The judge's words and actions must be considered in context as a whole. *Id.* Therefore, we apply the totality of the circumstances test

¹ Garcia-Molina also suggests that I.C. § 37-2732(k) "is likely unconstitutional as applied in any case where a defendant exercises his Fourteenth Amendment right to trial as, by its very nature, a defendant would be required to pay more in restitution simply because he exercised his right to trial rather than plead guilty." Garcia-Molina did not raise the constitutionality of I.C. § 37-2732(k) before the district court. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Furthermore, Garcia-Molina has provided no authority for his claim that I.C. § 37-2732(k) is unconstitutional. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

and examine the entire sentencing record in order to determine whether a defendant was sentenced vindictively for exercising his or her right to a trial. *Id.*

When a sentencing court does not comment on a defendant's decision to plead not guilty and go to trial and there is nothing in the record to support a claim of vindictiveness, due process has not been violated. *State v. Donohoe*, 126 Idaho 989, 992, 895 P.2d 590, 593 (Ct. App. 1995). In *Donohoe*, this Court determined that it was clear from the record that the magistrate did not hold the defendants' decisions to go trial against them at sentencing. *Id.* We noted that the magistrate heard the recommendation of counsel, considered the prior criminal records of the defendants, and addressed the standard sentencing objectives in his remarks. *Id.*

Courts in other jurisdictions generally have required remarks by a trial judge to explicitly threaten a defendant with a lengthier sentence should the defendant opt for a trial or indicate that a defendant's sentence was based on that choice. *State v. Kelly*, 770 A.2d 908, 947-48 (Conn. 2001). *See, e.g., United States v. Cruz*, 977 F.2d 732, 733 (2d Cir. 1992) (finding a due process violation where the court stated "I'm the kind of a judge where you get a fair trial. . . . [but] [i]f I find that after the trial that you didn't have a defense at all, you're going to get the maximum, because you're playing games with me"); *United States v. Hutchings*, 757 F.2d 11, 13-14 (2d Cir. 1985) (remanding for resentencing where sentencing court stated that trial was "a 'total waste of public funds and resources . . . there was no defense in this case. [The defendant] was clearly and unquestionably guilty, and there should have been no trial.'"); *People v. Mosko*, 475 N.W.2d 866, 868-69 (Mich. Ct. App. 1991), *aff'd*, 495 N.W.2d 534 (Mich. 1992) (remanding for resentencing where the sentencing court stated "I am very concerned about this case. . . . because it was a case that went to trial. . . . [a]nd to get up on the stand and [be] sanctimonious and you're self-righteous and you're guilty, that seems to me to be something that is--that is beyond [decent]").

In this case, the district court ordered restitution in the amount of \$5,109.73 pursuant to I.C. § 37-2732(k). That statute provides, in pertinent part, that upon conviction of certain felony offenses:

[T]he court may order restitution for costs incurred by law enforcement agencies in investigating the violation. Law enforcement agencies shall include, but not be limited to, the Idaho state police, county and city law enforcement agencies, the office of the attorney general and county and city prosecuting attorney offices. Costs shall include, but not be limited to, those incurred for the purchase of evidence, travel and per diem for law enforcement officers and witnesses

throughout the course of the investigation, hearings and trials, and any other investigative or prosecution expenses actually incurred, including regular salaries of employees.

I.C. § 37-2732(k). The state made the following recommendation at Garcia-Molina's sentencing:

Additionally, we are asking for restitution in this case. The restitution figure is quite high, *based upon the fact that this case did go to trial*. We're asking for a total amount of \$5,109.73. 100 of that is for testing the drugs in this case. \$1,987.23 is for the Twin Falls Police Department's time. And the remainder is for the prosecutor's office's time.

(Emphasis added). Garcia-Molina relies on the italicized portion of the state's recommendation for reaching the conclusion that he was punished for proceeding to trial. However, that recommendation was made by the state and was not a statement of the district court. Furthermore, the sentencing judge's statements should not be taken out of context and its words and actions must be considered as a whole. *See Regester*, 106 Idaho at 300, 678 P.2d at 92.

At sentencing, the district court concluded:

You are ordered to pay court costs. Fine is going to be declined, given the amount of restitution at \$5,109.73, which is ordered. No public defender reimbursement is ordered to the county, given the extent of restitution. Court Compliance is ordered at \$202.

Nowhere does the district court comment on Garcia-Molina's decision to take his case to trial or the strength of his defense. In addition, the district court did not threaten Garcia-Molina with a more severe sentence before he opted to go to trial.

Garcia-Molina asserts that "the cost of prosecuting a case is not a sentencing factor a court can consider in determining the appropriate punishment. The fact that Mr. Garcia-Molina exercised his right to a jury trial is not a sentencing factor that can justify an increase in his sentence." Although Garcia-Molina is correct in his assertion that the cost of a jury trial is not a sentencing factor, he overlooks the language of I.C. § 37-2732(k), which provides that investigative costs shall include any "investigative or prosecution expenses actually incurred." The district court did not vindictively sentence Garcia-Molina for his decision to go to trial. The district court simply followed the recommendation of the state and ordered restitution pursuant to statute.

Finally, the district court chose *not* to assess any fine--although a fine of up to \$25,000 is permitted by the statute--nor order reimbursement for the public defender costs specifically because of the “extent of restitution.” The district court’s decision not to impose a fine nor require reimbursement for the public defender because restitution costs were already high clearly shows that the district court was not vindictive in reaching its decision. Rather, the district court took into account the totality of its actions in fashioning Garcia-Molina’s sentence.

III.

CONCLUSION

The district court accepted the recommendation of the state and ordered Garcia-Molina to pay restitution as authorized by statute. The record contains no evidence suggesting that Garcia-Molina was punished or sentenced vindictively because he proceeded to trial. Therefore, Garcia-Molina’s judgment of conviction for possession of a controlled substance with intent to deliver is affirmed.

Chief Judge GUTIERREZ and Judge Pro Tem SCHWARTZMAN, **CONCUR.**